EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-1172 (2)

Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE DOCKET NO._____

UNITED STATES SUPREME COURT

1987 TERM

HARRY BEALE

v.

C. WILLIAM O'NEILL, et al.

APPENDIX TO PETITION FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harry A. Beale, Petitioner
775 Kaderly Drive
Columbus, Ohio 43228
614/276-4100

Representing himself

Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

58 pp

TABLE OF CONTENTS

Entry

Case C-2-86-1201 (Derivative Stockholder Suit)

1. Protective Order 1
2. Memorandum and Order 5
3. Order 11
4. Judgment, Memorandum and Order 14

Case C-2-86-1309 (Personal Suit)

1. Protective Order 24
2. Decision and Order 27
3. Judgment 33
4. Denial of Motion to Amend to Reflect the Complaint 34

Consolidated in Appeal

1. Order 36
2. Denial of Petition for Rehearing in Banc 42
3. Mandate 44

Title 42 USC §1983 50
Local Rules, Order 81-1 52
Verification 55
Certificate of Service

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE, FILED 1-5-87

Plaintiff

vs. Civil Action C-2-86-1201

C. WILLIAM O'NEILL, et al.,

Defendants

ORDER

This matter is before the Magistrate on the motion of defendant Joseph P. Kinneary for a protective order. Plaintiff has filed a memorandum contra the motion.

This defendant has filed a motion to dismiss the action as to him on the ground that he, as a federal judge, enjoys absolute immunity from liability

in this action. See Stump v. Sparkman, 435 U.S. 349, 355-57 (1978); Pierson v. Ray, 386 U.S. 547 (1966). This defendant now seeks a stay of discovery as to him pending resolution of this potentially dispositive motion.

Rule 26 (c) of the Federal Rules of Civil Procedure confers upon the Court a very broad discretion to manage the discovery process. See Seattle Times Co. v. Rhinehart, 104 Supp. Ct. 2199 (1984). Where the discovery sought promises to be both extensive and time-consuming, a stay of discovery pending resolution of potentially dispositive motion may be appropriate. See, e.g., Brennan v. Local U. No. 639 etc., 494 F.2d 1092 (D.C. Cir. 1974); E.E.O.C. v. Hickey-Mitchell Co., 372 F.Supp. 1117 (E.D. Mo. 1976). See also 4 Moore's Federal Practice 26.70[2]

(2d Ed. 1983).

Having carefully considered the motion and the memoranda of the parties, I conclude that a stay of discovery as to defendant Joseph P. Kinneary pending resolution of the motion to dismiss reasonably accommodates the interests of the parties to this action and is therefore appropriate.

The December 29, 1986 motion for a protective order is therefore GRANTED. Further discovery of defendant Joseph P. Kinneary is STAYED pending resolution of this defendant's motion to dismiss.

If any party seeks reconsideration of this Order, that party may, within ten (10) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Order, and

the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b) (1); Rule 72 (a), F.R. Civ. Pro.; Eastern Division Order 85-4 (I) (C) (2).

Norah McCann King
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHER DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE, : FILED 1-16-87

Plaintiff :

vs. : Case C-2-86-1201

C. WILLIAM O'NEILL, ESQ., ET AL., :

Defendant. :

MEMORANDUM AND ORDER

Plaintiff brings this action against numerous defendants alleging that they have taken improper actions and violated his constitutional rights. This matter is presently before the Court on the motion of defendant United States District Judge Joseph P. Kinneary to dismiss on the ground of judicial immunity.

In the complaint, plaintiff makes

the following allegation against Judge Kinneary:

> Kinneary is sued herein for conspiracy with Graham and/or in combination with failure to do his duty through misuse of his position and authority as Federal District Court Judge to deprive Beale and ACI [Applied Coatings International, Inc.] of their rights under the Constitution of the United States and to attempt to improperly force ACI into bankruptcy, i.e., matters not directly related to the verdict of the Court, which is material suitable only for appeal to a higher court.

In essence, plaintiff attacks the actions on inactions of Judge Kinneary in the course of performing his duties as judge in Applied Coatings v. Omnivax, Case No. C-2-84-1979.

It is established law that judges are absolutely immune from suit for

actions taken in their judicial capacity unless they are done in the clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 355-5(1978). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" Id. at 356-57; see also Dennis v. Sparks, 449 U.S. 24, 27 (1980). The rationale for judicial immunity was set forth in Pierson v. Ray, 386 U.S. 547, 554 (1967):

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His error may be corrected on appeal, but he should not have to fear that unsatisfied litigants may

> hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Plaintiff's reliance on Pulliam v. Allen, 466 U.S. 522 (1984) in support of his position that Judge Kinneary is a proper party to this action is misplaced. Pulliam was an action brought under 42 U.S.C. § 1983 in which plaintiffs alleged that a state magistrate, acting under color of state law, had an unconstitutional practice of imposing bail on persons arrested for non-jailable offenses under state law and incarcerating those persons if they could not meet bail. The District Court agreed and enjoined the practice as well as awarding costs and attorneys fees under 42 U.S.C. §1988. The Fourth Circuit

affirmed the decision, as did the United States Supreme Court. The Court stated:

> ...Congress intended §1983 to be an independent protection for federal rights and [we] find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review. We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.

Id. at 542. The Court further held that it was Congress' intent in enacting section 1988 to make attorneys fees available even when damages would be barred or limited. Id. at 543-44.

The present action is not one under 42 U.S.C. §1983 but is essentially one seeking damages from a federal judge based on alleged conduct of the judge in

his handling of a lawsuit involving the plaintiff. Although plaintiff may claim errors on the part of the judge by way of an appeal, plaintiff may not circumvent the appeal process by way of this collateral action. Pierson, 586 U.S. at 554.

The Court therefore finds the motion to dismiss of defendant District Judge Joseph P. Kinneary well-taken. It is therefore GRANTED and the case as against this defendant is DISMISSED in its entirety.

IT IS SO ORDERED.

John D. Holschuh, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE,	:	FILED 1-16-87
Plaintiff	:	
vs.	:	Case C-2-86-1201
C. WILLIAM O'NEILL, ESQ., ET AL.,	:	
Defendants	:	

ORDER

This matter is before the Court on the documents of plaintiff Beale entitled "Motion of Plaintiff Harry Beale for Judgment by Default," "Motion of Plaintiff Harry Beale for Determination of Competency of Defendant Kinneary," and "Motion of Plaintiff Harry Beale for consideration by the Court of the Order of the United States Magistrate in this Action, Filed 5 January 1987 and/or

Reconsideration of the Motion of Defendant Kinneary for a Protective Order."

In regard to the first motion, defendants Vorys, Sater, Seymour and Pease and C. William O'Neill were granted an extension of time up to and including December 30, 1986 in which to file a response. Defendants filed a motion to dismiss on December 30, 1986. The motion for judgment by default is therefore not well-taken and it is DENIED.

In regard to the second motion, there is absolutely no basis in fact or law to support it. It is therefore summarily DENIED.

In regard to the third motion,

the Court has reviewed the Order of the Magistrate and does not find it erroneous or contrary to law. The motion for consideration and/or reconsideration is therefore DENIED.

IT IS SO ORDERED.

_____

John D. Holschuh, Judge
United States District Court

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

HARRY BEALE **JUDGMENT IN A CIVIL CASE**

V. FILED 2-13-87

C. WILLIAM O'NEILL, ESQ.

et al CASE NUMBER: C2-86-1201
JUDGE JOHN D. HOLSCHUH

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDER AND ADJUDGED that this action is DISMISSED.

2-13, 1987
Date

KENNETH J. MURPHY
CLERK

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHER DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE, : FILED 2-13-87

Plaintiff, :

vs. : Case C-2-86-1201

C. WILLIAM O'NEILL, ESQ., ET AL., :

Defendants :

MEMORANDUM AND ORDER

Plaintiff brings this pro se action alleging that defendants have taken improper actions which have damaged Applied Coatings International, Inc. (ACI), a company of which he is a stockholder. This matter is presently before the Court on the motion to dismiss of defendants C. William O'Neill and Vorys, Sater, Seymour and Pease.

I. STATEMENT OF FACTS

Plaintiff has brought this action

pro se claiming to represent the interests of ACI. The defendants are two attorneys, C. William O'Neill (O'Neill) and Richard C. Graham (Graham), and two law firms, Vorys, Sater, Seymour and Pease (Vorys, Sater) and Isaac, Brant, Ledman Becker (Isaac, Brant). Initially, the Honorable Joseph P. Kinneary, Judge of the United States District Court for the Southern District of Ohio, was also a defendant; however, this Court dismissed the action against Judge Kinneary on January 16, 1987 on the ground of judicial immunity.

The essence of plaintiff's complaint is that ACI has received unfavorable judicial determinations in Case No. C-2-84-1979, **Applied Coatings International, Inc. v. Omnivax, Inc.**, a case still pending in this Court before

Judge Kinneary, due to the improper actions of defendants. In Count 1,plaintiff alleges malpractice on the part of O'Neill and Vorys, Sater. Count 2 related solely to Judge Kinneary and has therefore been dismissed. In Count 3, plaintiff alleges that Graham exerted improper influence over Judge Kinneary and Isaac, Brant was aware of Graham's actions. In Count 4, plaintiff alleges that a "synergetic phenomena" has developed through the improper actions of the defendants.[1]

---

1 Plaintiff has moved to supplement his amended complaint for the purpose of adding several hundred pages of documents as exhibits. It therefore has no bearing on the present motion which is limited to the allegations stated in the complaint.

Plaintiff demands damages on behalf of ACI and his costs for maintaining this action.

III. LEGAL ANALYSIS

Defendants O'Neill and Vorys, Sater have raised four arguments in support of their motion; failure of proper service, lack of subject matter jurisdiction, improper collateral attack, and failure to properly plead a derivative action. Because the Court finds that it lacks subject matter jurisdiction over the present dispute, it is only necessary to consider this argument.

District courts are courts of limited jurisdiction. Consequently, the party seeking to invoke the jurisdiction of the federal courts bears the burden of establishing that such jurisdiction

exists. Thomson v. Gaskill, 315 U.S. 442, 446 (1941).

In his statement on jurisdiction plaintiff alleged that Judge Kinneary had violated plaintiff's constitutional rights. In regard to the remaining defendants, plaintiff argued that the Court had the duty to monitor the conduct of the members of its bar. There is no allegation that the conduct of these defendants raised a federal question. Indeed, in his response to defendants' motion to dismiss, plaintiff stated:

> All the presented arguments relative to jurisdiction are specious. Jurisdiction of this Court over matters involving activities of attorneys in Federal District Court were amply presented with ruling citations in the complaint, since Beale anticipated arguments upon the point.

Construing the complaint most favorably to plaintiff, Counts 1, 3 and 4 are state claims for malpractice with no independent basis for invoking federal jurisdiction.[2] As stated earlier, Count 2 which presented the only arguable issue of a federal question, has been dismissed. In that the Court has dismissed plaintiff's federal claim, this Court has the authority to consider these state claims only if it decides to exercise its power of pendent jurisdiction. "It has consistently been

---

2 Alternatively, the claims can be viewed as a collateral attack on decisions rendered in Case No. C-2-84-1979 presently pending before Judge Kinneary in the Federal District Court for the Southern District of Ohio. As stated in this Court's Order of January 16, 1987, however, plaintiff's proper recourse in that case is by way of appeal.

recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). The Sixth Circuit has adopted the position that "district courts have minimal discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial." Province v. Cleveland Press Publishing Co., 787 F. 2d 1047, 1055 (6th Cir. 1986); Service, Hospital, Nursing Home and Public Employees Union v. Commercial Property Services, 755 F. 2d 499, 506 n. 9 (6th Cir. 1985).

The Court declines to exercise its power of pendent jurisdiction and defendants O'Neill and Vorys, Sater's motion to dismiss is therefore GRANTED.

Additionally, although there is no motion to dismiss presently pending by defendants Graham and Isaac, Brant, the allegations against these defendants also are state claims of malpractice, and the Court therefore has the duty to raise the defect in subject matter jurisdiction on its own initiative. In re Martinez, 721 F. 2d 262, 264 (9th Cir. 1983); Manway Construction v. Housing Authority of city of hartford, 711 F. 2d 501, 503 (2d Cir. 1983); Fed. R. Civ. P 12(h) (3). The plaintiff has had an opportunity to be heard as to why this Court has jurisdiction over these claims and the Court has found them to rest solely in state law. The Court declines to exercise its power of pendent jurisdiction over these claims as well

and this case is therefore DISMISSED in its entirety.

IT IS SO ORDERED.

_____

John D. Holschuh, Judge
United States District
Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARRY BEALE — FILED 1-5-87

Plaintiff

vs. — Civil Action C-2-86-1309

C. WILLIAM O'NEILL, ESQ., et al.

Defendants

ORDER

Defendant's December 29, 1986 motion for a protective order is GRANTED.

Defendant Joseph P. Kinneary, United States District Judge, has filed a December 17, 1986 motion to dismiss based on judicial immunity. Defendant moves to delay his deposition until after the Court has an opportunity to rule on his motion to dismiss.

Judicial immunity is immunity from suit. Its purpose is to protect judicial officers from the vexations and expense of defending his judicial actions so that he is "free to act on his own convictions, without apprehension of personal consequences to himself. "Bradley v. Fisher, 13 Wal. 335, 347 (1872). The issue of whether a defendant is entitled to immunity must be resolved before there are any proceedings on the merits of a case. Mitchell v. Forsyth, 53 U.S.L.W. 4798, 4802 (U.S. S.Ct. June 19, 1985). Until this question is decided, discovery should not be allowed. Harlow v. Fitzgerald, 457 U.S. 800, 817-818 (1982).

Under the provisions of 28 U.S.C. §636(b) (1) (A), Rule 72(a), Fed. R. Civ. P. and Eastern Division Order No. 85-4,

pt. I,C. 2, either party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. The motion must specifically designate the order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous of contrary to law.

_____

United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Harry Beale, FILED 1-26-87

Plaintiff,

vs. Case No. C-2-86-1309
JUDGE GRAHAM

C. William O'Neill, Esq., et al.,

Defendants.

DECISION AND ORDER

Pending before the court is the motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted filed by defendant, United States District Judge Joseph P. Kinneary. The motion to dismiss is based upon the theory that suit is barred by the doctrine of judicial immunity.

The United States Supreme Court long ago adopted the common law rule that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction or are alleged to have been done maliciously or corruptly. Bradley v. Fisher, 13 Wall. 335, 351 (1872).

A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors, or if he acted maliciously or in excess of his authority. Stump v. Sparkman, 435 U.S. 349 (1978). A judge is only liable if he acted in clear absence of all jurisdiction. Id., 356-357.

The policy behind the doctrine of

judicial immunity was discussed by the Supreme Court in Pierson v. Ray, 386 U.S. 547, 554 (1967), as follows:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal,but he should not have to fear that unsatisfied litigants may hound him with litigants charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Judicial immunity applies both to judicial action and inaction. Carter v. Duggan, 455 F.2d 1156 (5th Cir. 1972); Littletohn v. Fisher, 530 F.2d 691 (6th Cir. 1976).

An examination of the complaint in the instant case reveals that the acts complained of arose in connection with a

civil action over which defendant Judge Kinneary was presiding. (Complaint, Paragraph 21). The legal ruling alleged to be erroneous were made by Judge Kinneary in the exercise of his judicial jurisdiction in that case. The refusal of Judge Kinneary to initiate disciplinary action against the attorneys involved in that lawsuit was likewise a decision within his discretion and judicial province.

The recent decision in Pulliam v. Allen, 466 U.S. 522 (1984) does not alter the applicability of judicial immunity in this case. Pulliam involved a civil rights action under 42 U.S.C. Section 1983 wherein the plaintiffs were seeking prospective injunctive relief. The present suit is not one under Section 1983, and plaintiff seeks money damages,

not injunctive relief.

The claims in the instant complaint relate exclusively to alleged acts of Judge Kinneary within the scope of his jurisdiction as a United States District Judge. Therefore, the instant action is barred by the doctrine of judicial immunity, and the complaint as to Judge Kinneary fails to state a claim for which relief may be granted. The motion to dismiss Judge Kinneary as a party defendant is hereby sustained.

Plaintiff's motion for default judgment is hereby overruled.

The remaining claims in the complaint are state claims with no independent basis for invoking federal jurisdiction. In the absence of a substantial federal claim related to asserted state claims in such a way that the entire action may

properly be deemed one case, federal courts do not have jurisdiction over purely state claims. Gibson v. First Federal Savings & Loan Assoc., 504 F.2d 826 (6th Cir. 1974); United Mine Workers v. Gibbs, 383 U.S. 715 (1966). A dismissal of all federal claims before trial requires dismissal of the state claims as well. Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977) cert. denied 434 U.S. 972; Gibson v. First Federal Savings & Loan Assoc., supra at 830-831.

Whereupon, the motion to dismiss the claims against Judge Kinneary is hereby granted. The court lacks subject matter jurisdiction over the remaining claims and they are therefore dismissed. The case is hereby dismissed in its entirety.

JAMES L. GRAHAM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN A CIVIL CASE

Harry Beale FILED 2-6-87

v.

C. William O'Neill, Esq. et al.

Case Number: C-2-86-1309

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED this action is **DISMISSED.**

2-6-87
Date

KENNETH J. MURPHY
Clerk

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Harry Beale, FILED 2-13-87

Plaintiff,

vs. Case No. C-2-86-1309
JUDGE GRAHAM

C. William O'Neill, Esq. et al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiff has filed a motion to reconsider this court's judgment dismissing the instant case. Plaintiff requests reconsideration under Rule 52(b), Fed. R. Civ. P. That rule is inapplicable to the instant case. This court will consider plaintiff's motion as one to alter or amend the judgment under Rule 59, Fed. R. Civ. P. Having duly

considered plaintiff's motion, the court finds that said motion is not well taken, and plaintiff's motion to reconsider is hereby **OVERRULED.**

It is so ORDERED.

JAMES L. GRAHAM
United States District Judge

No. 87-3152
No. 87-3170

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARRY BEALE, FILED 8-14-87

Plaintiff-Appellant,

v. ORDER
C. WILLIAM O'NEILL;
VORYS,SATER,SEYMOUR AND PEASE;
RICHARD C. GRAHAM;
ISAAC, BRANT, LEDMAN AND BECKER;
JOSEPH P. KINNEARY, JUDGE,

Defendants-Appellees.

BEFORE: LIVELY, Chief Judge; MILBURN and RYAN, Circuit Judges.

These cases have been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and records, this panel agrees unanimously that oral argument is not needed. Rule 34 (a), Federal Rules of Appellate Procedure.

Plaintiff, president of and stockholder in Applied Coatings International, Inc., has moved for a stay of a district court's order of garnishment which was entered to satisfy a judgment of $100,000.00 against Applied Coatings International, Inc. Defendants O'Neill and Vorys, Sater, Seymour and Pease have moved for assessment of cost against plaintiff pursuant to Fed. R. App. P. 38.

This court lacks jurisdiction to entertain plaintiff's motion for a stay. The orders of garnishment which plaintiff seeks to stay resulted from district court Case No. 84-1979, Applied Coatings International, Inc. v. Omnimax, Inc. That case resulted in a default judgment against Applied Coatings in the amount of $100,000.00. Because plaintiff did not

appeal the judgment which resulted in the garnishment orders, this court lacks jurisdiction to stay the garnishment orders. See Fed. R. App. P. 8(a); Frisch's Restaurant, Inc. v. Shoneys, Inc., 759 F.2d 1261 (6th Cir. 1985). Accordingly, the stay must be denied.

The appeals over which this court has jurisdiction originated in two complaints filed by plaintiff in an individual capacity, and in his capacity of representing the stockholders in Applied Coatings International, Inc. in a stockholders derivative suit. Plaintiff alleged that Judge Kinneary, who rendered the default judgment against Applied Coatings International, Inc., and defendant Graham, the attorney who represented Omnimax in Case No. 84-1979, conspired to deprive him of his

constitutional rights. He further alleged that defendant O'Neill had represented Applied Coatings International, Inc. in Case No. 84-1979 and his representation therein constituted legal malpractice. The district court dismissed both actions.

With respect to the district court's orders dismissing the actions under review in Case Nos. 87-3152 and 87-3170, we conclude that the district court disposed of these cases. Clearly, Judge Kinneary was cloaked with immunity. Stump v. Sparkman, 435 U.S. 349 (1978). Plaintiff's claims against defendants O'Neill and the Vorys firm were claims of legal malpractice which did not present a federal question. The claims against defendants Graham and the Isaac firm as attorneys for Omnimax sounded in

conspiracy with Judge Kinneary, and even the most liberal construction results in the conclusion that plaintiff failed to state a claim against those defendants. Mere conclusory allegations are not sufficient to state a claim for damages based on an alleged conspiracy. Smith v. Rose, 760 F.2d 102, 106 (6th Cir. 1985). The claims against all of the defendants are properly construed as plaintiff's attempt to collaterally attack the judgment in Case No. 84-1979. The proper procedure to secure review of that judgment would have been to take a direct appeal.

The motions for a stay and for assessment of costs are hereby denied, the motion to dispense with oral argument

is hereby granted, and the judgments of the district court are hereby affirmed. Rule 9(b)(5)1, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____
Clerk

NO. 76-3152/70
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARRY BEALE, FILED 10-16-87	)
	)
Plaintiff-Appellant,	)
	)
v.	) ORDER
	)
C. WILLIAM O'NEILL ET AL.,	)
	)
Defendants-Appellees	)

BEFORE: LIVELY, Chief Judge, MILBURN and RYAN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

John P. Hehman, Clerk

No. 87-3152
No. 87-3170

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARRY BEALE,	)	MANDATE
	)	ISSUED
Plaintiff-Appellant,	)	
	)	11-3-87
v.	)	
	)	
C. WILLIAM O'NEILL;	)	
VORYS,SATER,SEYMOUR & PEASE;	)	
RICHARD C. GRAHAM;	)	
ISAAC,BRANT,LEDMAN & BECKER;	)	
JOSEPH P. KINNEARY, JUDGE,	)	
	)	
Defendants-Appellees.	)	

BEFORE: LIVELY, Chief Judge; MILBURN and RYAN, Circuit Judges.

These cases have been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and records, this panel agrees unanimously that oral argument is not needed. Rule 34 (a),

Federal Rules of Appellate Procedure.

Plaintiff, president of and stockholder in Applied Coatings International, Inc., has moved for a stay of a district court's order of garnishment which was entered to satisfy a judgment of $100,000.00 against Applied Coatings International, Inc. Defendants O'Neill and Vorys, Sater, Seymour and Pease have moved for assessment of costs against plaintiff pursuant to Fed. R. App P. 38.

This court lacks jurisdiction to entertain plaintiff's motion for a stay. The order of garnishment which plaintiff seeks to stay resulted from district court Case No. 84-1979, Applied Coatings International, Inc. v. Omnimax, Inc. That case resulted in a default judgment against Applied Coatings in the amount of

$100,000.00. Because plaintiff did not appeal the judgment which resulted in the garnishment orders, this court lacks jurisdiction to stay the garnishment orders. See Fed. R. App. P. 8(a); Frisch's Restaurant, Inc. v. Shoneys, Inc. 759 F.2d 1261 (6th Cir. 1985). Accordingly, the stay must be denied.

The appeals over which this court has jurisdiction originated in two complaints filed by plaintiff in an individual capacity, and in his capacity of representing the stockholders in Applied Coatings International, Inc. in a stockholders derivative suit. Plaintiff alleged that Judge Kinneary, who rendered the default judgment against Applied Coatings International, Inc., and defendant Graham, the attorney who represented Omnimax in Case No. 84-1979,

conspired to deprive him of his constitutional rights. He further alleged that defendant O'Neill had represented Applied Coatings International, Inc. in Case No. 84-1979 and his representation therein constituted legal malpractice. The district court dismissed both actions.

With respect to the district court's orders dismissing the actions under review in Case Nos. 87-3152 and 87-3170, we conclude that the district court correctly disposed of these cases. Clearly, Judge Kinneary was cloaked with immunity. Stump v. Sparkman, 435 U.S. 349 (1978). Plaintiff's claims against defendants O'Neill and the Vorys firm were claims of legal malpractice which did not present a federal question. The claims against defendants Graham and the

Isaac firm as attorneys for Omnimax sounded in conspiracy with Judge Kinneary, and even the most liberal construction results in the conclusion that plaintiff failed to state a claim against those defendants. Mere conclusory allegations are not sufficient to state a claim for damages based on an alleged conspiracy. Smith v. Rose, 760 F.2d 102, 106 (6th Cir. 1985). The claims against all of the defendants are properly construed as plaintiff's attempt to collaterally attack the judgment in Case No. 84-1979. The proper procedure to secure review of that judgment would have been to take a direct appeal.

The motions for a stay and for assessment of costs are hereby denied, the motion to dispense with oral argument is hereby granted, and the judgments of

the district court are hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____

Clerk

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule V1, ORDER 81-1,
LOCAL RULES OF THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

DISCIPLINARY PROCEEDINGS.

A. When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before this Court shall come to the attention of a Judge of this Court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these Rules, the Judge shall refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

B. Should counsel conclude after investigation and review that a formal

disciplinary proceeding should not be initiated against the respondent-attorney because sufficient evidence is not present, or because there is pending another proceeding against the respondent-attorney, the disposition of which in the judgment of the counsel should be awaited before further action by this court is considered or for any other valid reason, counsel shall file with the court a recommendation for disposition of the matter, whether by dismissal, admonition, deferral, or otherwise setting forth the reasons therefor.

C. To initiate formal disciplinary proceedings, counsel shall obtain an order of this Court upon a showing of probable cause requiring the respondent-attorney to show cause within 30 days

after service of that order upon that attorney, personally or by mail, why the attorney should not be disciplined.

D. Upon the respondent-attorneys's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation this Court shall set the matter for prompt hearing before one or more Judges of this Court, provided however, that if the disciplinary proceeding is predicated upon the complaint of a Judge of this Court the hearing shall be conducted before a panel of three other Judges of this Court appointed by the Chief Judge, or, if there are less than three Judges eligible to serve or the Chief Judge is the complainant, by the Chief Judge of the Court of Appeals for this Circuit.

VERIFICATION

State of Ohio:

County of Franklin:

The undersigned, being duly sworn, hereby saith that the above statements in the petition are true, except those made on information and belief, and as to those, he verily believes them to be true.

Harry A. Beale

Harry A. Beale, Plaintiff

Sworn to and subscribed before me a notary public in and for the above county and state this 6 day of Jan, 1988 ~~1987~~.

Notary Public

my comm exp: Jan 9, 1989

CERTIFICATE OF SERVICE

The Petitioner herewith certifies that copies of this Appendix have been served this date by regular U.S. Mail, postage prepaid, in accord with Rule 28, Rules of the Supreme Court of the United States upon the following at the address indicated: Date_____

Mr. Duke Thomas
Vorys, Sater, Seymour & Pease
52 East Gay Street
Columbus, Ohio 43215

Mr. James E. Rattan
Assistant U.S. Attorney
Room 200, U.S. Courthouse
85 Marconi Boulevard
Columbus, Ohio 43215

Mr. John M. Alton
Lane, Alton & Horst
155 East Broad Street
Columbus, Ohio 43215

_____

Harry A. Beale, Petitioner
775 Kaderly Drive
Columbus, Ohio 43228
614/276-4100
Representing himself